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# *IN THE SUPREME COURT OF THE UNITED STATES*

WASHINGTON STATE MEDICAL QUALITY ASSURANCE COMMISSION,

*PETITIONER,*

v.

BANG D. NGUYEN, M.D.,

*RESPONDENT.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Every state licenses physicians to practice medicine and imposes sanctions for violating standards of professional conduct, which may include revocation of the license. Thirty states, including Washington, have chosen preponderance of the evidence as the burden of proof necessary to establish a violation. This case presents the following question:

> Does the Due Process Clause of the Fourteenth Amendment require the states to apply the clear and convincing evidence standard of proof to revoke a license to practice medicine instead of the preponderance of the evidence standard they have chosen?

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## PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the Washington State Medical Quality Assurance Commission, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

## OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 144 Wash. 2d 516, 29 P.3d 689. App. at 1.[1] The opinion of the Washington Court of Appeals is reported at 99 Wash. App. 96, 994 P.2d 216. App. at 49. The Memorandum Order Affirming Commission, which was issued by the King County Superior Court, is unpublished. App. at 59. The Findings Of Fact, Conclusions Of Law And Final Order of the Medical Quality Assurance Commission is also unpublished. App. at 67.

## JURISDICTION

The judgment of the Washington Supreme Court was entered on August 23, 2001. App. at 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The judgment is final for purposes of 28 U.S.C. § 1257(a), even though the Washington Supreme Court remanded the case to the Medical Quality Assurance Commission for further proceedings. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), identified four categories of judgments which would be treated as final, even though there were further state proceedings. The third

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[1] "App." refers to the separately bound Appendix To The Petition For A Writ Of Certiorari.

category is a judgment "where the federal claim has been finally decided . . . but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case". *Cox Broad. Corp.*, 420 U.S. at 481. This case falls into the third category.

The Commission, by a preponderance of the evidence, held that Dr. Nguyen committed acts of unprofessional conduct and revoked his license to practice medicine. The Washington Supreme Court reversed. The court ruled that the Due Process Clause required clear and convincing evidence—not a preponderance of the evidence. This is a final decision on Dr. Nguyen's federal constitutional claim. The Washington Supreme Court remanded the case to the Commission "to conduct such further proceedings as are necessary to determine this matter by clear and convincing proof". *Nguyen v. Dep't of Health*, 144 Wash. 2d 516, 29 P.3d 689, 697 (2001) (*Nguyen* II), App. at 20. The Commission cannot obtain review of the Due Process question regardless of the outcome on remand. If the Commission establishes unprofessional conduct by clear and convincing evidence, the issue will be moot. If the Commission rules that the clear and convincing burden has not been met, it cannot obtain judicial review of the federal question. Under Washington law, a person can only seek judicial review of an agency order if he or she is aggrieved by it. Wash. Rev. Code § 34.05.530, App. at 210. The Commission cannot be aggrieved by its own order that Dr. Nguyen did not commit unprofessional conduct.

This case is similar to *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles*, the state court ruled that the admission of certain evidence violated the defendant's constitutional rights and remanded for a new trial. This Court

held that the judgment was subject to review under 28 U.S.C. § 1257 stating: "In this case should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal." *Quarles*, 467 U.S. at 651 n.1.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part "nor shall any State deprive any person of life, liberty, or property, without due process of law".

Wash. Admin. Code § 246-11-520 provides: "Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence." App. at 258.

Other statutes relevant to this case are set out in the appendix. These include laws governing the licensing and regulation of physicians, Wash. Rev. Code 18.71; the Uniform Disciplinary Act, Wash. Rev. Code 18.130; Washington Administrative Procedure Act, Wash. Rev. Code 34.05; and the Model Procedural Rules For Boards, Wash. Admin. Code 246-11. App. at 163-74; 175-204; 205-19; 220-265.

## STATEMENT

Every state in the United States licenses the practice of medicine and disciplines physicians for violating standards of professional conduct. Yet the states' regulatory regimes are not the same. States make different public policy choices to best serve the needs of their citizens. This case concerns

the choice of the standard of proof. A majority of states—including Washington—select the preponderance of the evidence standard to prove unprofessional conduct.[2] Other states have selected the clear and convincing evidence standard.[3] The question in this case is whether the Due Process Clause removes state choice and requires a single constitutional standard. We begin by briefly explaining Washington's regulatory regime and the disciplinary proceeding at issue in this case.

## 1. Regulation Of The Practice Of Medicine In Washington

Washington has a comprehensive regulatory system to license and discipline physicians. The state regulates physicians because "the health and well-being of the people of this state are of paramount importance [and because] the conduct of members of the medical profession . . . plays a vital role in preserving the health and well-being of the people of the state". Wash. Rev. Code § 18.71.003(2), (3), App. at 163-64. The regulation is carried out by the Washington State Medical Quality Assurance Commission. The Commission is appointed by the governor and consists of thirteen licensed physicians, two licensed physician assistants, and four members of the general public. Wash. Rev. Code § 18.71.015, App. at 165.

The Commission is responsible for issuing licenses to practice medicine. "No person may practice or represent himself or herself as practicing medicine without first having

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[2] *See* notes 7 & 8 *infra* p. 24, 26.

[3] *See* note 9 *infra* p. 26.

a valid license to do so." Wash. Rev. Code § 18.71.021, App. at 168. Applicants for a license must meet certain requirements such as graduation from a medical school approved by the Commission. Applicants must also pass an examination administered by the Commission. Wash. Rev. Code §§ 18.71.050-.055, .070, App. at 168-70, 171. Once issued, a license must be periodically renewed and, as part of this process, the Commission imposes a requirement for continuing medical education. Wash. Rev. Code § 18.71.080, App. at 171-72.

The Commission is also responsible for disciplining physicians. Wash. Rev. Code §§ 18.71.019, 18.130.040(2)(b)(ix), App. at 167-68, 177-78. A physician is subject to discipline for unprofessional conduct which includes, among other standards, commission of an act of moral turpitude relating to the practice of medicine, incompetence, negligence, and malpractice. Wash. Rev. Code § 18.130.180(1), (4), App. at 197-98. The Commission can choose from a wide range of sanctions but in selecting a sanction the Commission "must first consider what sanctions are necessary to protect or compensate the public". Wash. Rev. Code § 18.130.160, App. at 188. Possible sanctions include remedial education, required monitoring of the physician's practice, payment of a fine not to exceed $5,000 per violation, and suspension or revocation of the license to practice. Wash. Rev. Code § 18.130.160, App. at 187-88. If a license is suspended or revoked, the physician can petition the Commission for reinstatement after a period of time. Wash. Rev. Code § 18.130.150; App. at 186-87.

The procedures governing physician discipline are set out in the Uniform Disciplinary Act. Wash. Rev. Code 18.130, App. at 175-205. Any person can file a complaint

with the Commission charging a physician with unprofessional conduct. The Commission will investigate if it concludes that the complaint has merit. The Commission can also investigate without a formal complaint if it has reason to believe the physician may have engaged in unprofessional conduct. Wash. Rev. Code § 18.130.080, App. at 180-81. Prior to taking a written statement, the investigator must notify the physician in writing of the nature of the complaint, that the physician has a right to consult with an attorney, and that the statement may be used at the hearing. Wash. Rev. Code § 18.130.095(2)(a), App. at 183.

After the investigation, the Commission will issue a statement of charges if there is reason to believe there has been a violation. At this point, the physician can request a hearing. Wash. Rev. Code § 18.130.090, App. at 181-82. The hearing is governed by Washington's Administrative Procedure Act, Wash. Rev. Code 34.05. Wash. Rev. Code § 18.130.100, App. at 185.

In addition to the procedures in the Administrative Procedure Act, the Washington Legislature authorized the Secretary of the Washington State Department of Health in consultation with the Commission to adopt uniform procedural rules. Wash. Rev. Code § 18.130.095(1)(a), App. at 182. The preponderance of the evidence standard at issue in this case was adopted pursuant to this authority. Wash. Admin. Code § 246-11-520 provides that

> "the burden is on the department to prove the alleged factual basis set forth in the initiating document. Except as otherwise provided by statute, the burden in all cases is a *preponderance of the evidence*." App. at 258 (emphasis added).

The uniform procedural rules provide that a physician may be represented by an attorney. Wash. Admin. Code § 246-11-070(1)(a), App. at 224. The rules also provide for interpreters, subpoenas, and the opportunity for discovery. Wash. Admin. Code §§ 246-11-210, -220, -370, App. at 229-33, 245-49.

At the conclusion of the hearing, the Commission must prepare findings of fact and conclusions of law. If the charge of unprofessional conduct is not sustained the findings must include a "public exoneration of the licensee". Wash. Rev. Code § 18.130.110(1), App. at 185. A physician aggrieved by the Commission order can obtain judicial review pursuant to the Administrative Procedure Act, and the final order must give notice of the opportunity for judicial review. Wash. Admin. Code § 246-11-600(1), (2), App. at 264.

**2. Procedural History**

In 1989, the Medical Disciplinary Board (the predecessor to the Commission) entered into an a Stipulation and Agreed Final Order with Dr. Nguyen. Dr. Nguyen agreed that he provided care to patients which fell below acceptable standards. App. at 72, ¶ 3.2. His license was indefinitely suspended but the suspension was stayed on the condition that Dr. Nguyen deliver care to patients which meets acceptable standards. Dr. Nguyen also agreed to have his practice supervised and monitored by other physicians. App. at 72-73, ¶¶ 3.3 to 3.4.

In 1994, another Statement of Charges was issued alleging violations of unprofessional conduct with 20 patients. The hearing on these charges was continued when Dr. Nguyen agreed to appear for an evaluation at the Colorado Personalized Education for Physicians Program (CPEP). App. at 68, ¶¶ 1.2 to 1.3. The CPEP assessment

took place in 1996 and demonstrated that Dr. Nguyen "practices medicine in a manner that creates an unreasonable risk that patients may be harmed". App. at 68-69, ¶ 1.4.

After the CPEP assessment, in October 1996 the Commission filed an Amended Statement of Charges. App. at 139-146. The Amended Statement of Charges alleged that Dr. Nguyen's treatment of 22 patients constituted "[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed." App. at 145, ¶ 4.1. The Amended Statement of Charges included the 20 patients listed in the 1994 Statement of Charges. App. 68-69, ¶ 1.14. Dr. Nguyen filed an answer denying most of the charges and requesting a hearing. App. at 147-50.

In December 1996, the Commission issued a new Statement of Charges against Dr. Nguyen. App. at 151-55. This Statement alleged that Dr. Nguyen had improper sexual conduct with three female patients—two of them minors. In his answer, Dr. Nguyen denied the charges and requested a hearing. App. at 157-61. He also requested a qualified interpreter be appointed who spoke Vietnamese.

In May and June 1997, the Commission held a six day hearing. The members of the Commission who heard the case included two physicians and two public members. A health law judge presided over the hearing. Dr. Nguyen was represented by an attorney and a certified court interpreter was present. App. at 67. The Commission heard testimony from fifteen witnesses and considered numerous exhibits. App. at 69-71. In September 1997, the Commission issued Findings of Fact, Conclusions of Law and Final Order. App. at 67-137. In weighing the evidence the Commission required the case to be proven by a preponderance of the evidence. App. at 127, ¶ 4.2. Based on this standard the Commission found Dr. Nguyen's conduct was

unprofessional—constituting incompetence, negligence, or malpractice. App. at 128, ¶ 4.4. The Commission also found unprofessional conduct consisting of abuse or sexual contact with a patient. App. at 129, ¶ 4.8. Some of the charges against Dr. Nguyen were not sustained and they were dismissed. App. at 129, ¶ 4.7; 130, ¶¶ 4.11-4.12; 136, ¶ 5.3.

In considering the appropriate penalty, the Commission "must first consider what sanctions are necessary to protect . . . the public". App. at 131, ¶ 4.15. Only then can the Commission consider other requirements "designed to rehabilitate the license holder". App. at 131, ¶ 4.15. The Commission concluded the proper sanction was to revoke Dr. Nguyen's license to practice medicine. App. at 136, ¶ 5.1. According to the Commission, although "provided many opportunities, [Dr. Nguyen] has failed to correct noted practice deficiencies. . . . [Dr. Nguyen] has had more than sufficient time and direction by the commission to improve his practice skills". App. at 133-34, ¶ 4.20. Although his license was revoked, the Order provides that Dr. Nguyen can reapply in five years. App. at 136, ¶ 5.1.

Dr. Nguyen petitioned for judicial review of the Commission's order arguing, among other issues, that the preponderance of the evidence standard violated the Due Process Clause. The superior court recognized that "there is a split throughout the country on whether or not a preponderance of the evidence standard is sufficient to revoke a doctor's license to practice medicine". App. at 60. The superior court concluded that the preponderance standard was consistent with Due Process in part because of the "strong substantive and procedural safeguards built into this state's structure for disciplining medical doctors". App. at 62.

Dr. Nguyen appealed the superior court decision to the Washington Court of Appeals. The court of appeals affirmed the superior court decision that the preponderance

standard did not violate the Due Process Clause. *Nguyen v. Dep't of Health*, 99 Wash. App. at 96, 994 P.2d 216 (1999) (*Nguyen* I), App. at 49-58. The court began by acknowledging that the "states that have addressed this issue are split". *Nguyen* I, 994 P.2d at 219, App. at 54. The court went on to apply the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). First, the court found that the private interest was substantial. "The revocation of a medical license is not only an economic loss but also damaging to professional and personal reputation." *Nguyen* I, 994 P.2d at 220, App. at 55. Second, the court found that the "government's interest in protecting the public is weighty". *Id.* at 220, App. at 56. Finally, the court reviewed the procedural safeguards and concluded that "there is not a substantial risk of inaccurate findings or erroneous conclusions and that increasing the burden to clear and convincing would decrease the risk minimally". *Id.* at 221, App. at 57.

The Washington Supreme Court granted Dr. Nguyen's petition for discretionary review and reversed the court of appeals in a divided decision. *Nguyen v. Dep't of Health*, 144 Wash. 2d 516, 29 P.3d 689 (2001) (*Nguyen* II), App. at 1-47. The five-justice majority began by recognizing that: "State precedent from other jurisdictions is divided." *Nguyen* II, 29 P.3d at 691 & n.3, App. at 4 & n.3. The majority went on to analyze the three *Mathews* factors. First, the majority ruled that Dr. Nguyen had a "profound" interest in his medical license. *Nguyen* II, 29 P.3d at 694, App. at 11. The majority analogized the economic loss and stigma associated with license revocation to a "significant deprivation of liberty", similar to civil commitment in *Addington v. Texas*, 441 U.S. 418 (1979), or termination of parental rights in *Santosky v. Kramer*, 455 U.S. 745 (1982). *Nguyen* II, 29 P.2d at 694, App. at 12-13. Second, the

majority concluded that the preponderance standard created a high risk of an erroneous result. The majority reasoned that procedural safeguards cannot "substitute for . . . failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error". *Nguyen* II, 29 P.3d at 695, App. at 15 (internal quotation marks omitted). Finally, the majority evaluated the government's interest which it limited to "the efficient and economic administration of its affairs". *Id.* at 696, App. at 17 (internal quotation marks omitted). The majority concluded that this interest was not damaged because an "increased burden of proof would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se". *Id.* at 696, App. at 18.

Three justices dissented in *Nguyen* II. The dissent began by observing that the "preponderance standard used in civil proceedings is generally applied in administrative hearings in Washington unless otherwise mandated by statute or due process principles". *Nguyen* II, 29 P.3d at 698, App. at 22. Turning to the *Mathews* factors, the dissent first concluded that "Dr. Nguyen's private interest is significantly affected". *Id.* at 702, App. at 32. But the dissent rejected the notion that Dr. Nguyen had a liberty interest in his license. According to the dissent, a "professional disciplinary process may implicate liberty interests as well, particularly when stigma may result from such proceedings. But a liberty interest in the sense of freedom from confinement is not implicated by professional discipline." *Id.* at 701, App. at 28. Second, the dissent found that the risk of error was minimal "given the numerous procedural protections afforded Dr. Nguyen". *Id.* at 705, App. at 37. The procedural protections listed by the dissent included an unbiased tribunal, notice of the proposed action and grounds asserted

for it, the right to a hearing, the right to call witnesses, the right to know the evidence against one, the right to have decisions based only on the evidence presented, the right to counsel, and the right of judicial review. *Id.* at 703-04, App. at 33-37. Finally, the dissent evaluated the government's interest and concluded that the "State's interest in regulating the practice of medicine and protecting the public from incompetent or unscrupulous practitioners is of vital significance to the State and its citizens". *Id.* at 707, App. at 42. In balancing these factors the dissent concluded that the preponderance standard did not violate Due Process. The dissent noted that this is the majority rule, although it acknowledged that some other states had held to the contrary. *Id.* at 707 n.10, App. at 43 n.10.

## REASONS FOR GRANTING THE PETITION

The Court should grant the petition for four important reasons. First, there is a significant conflict among the states over the burden of proof required by the Due Process Clause in a medical disciplinary proceeding. The conflict represents a fundamental constitutional issue about the private interests at stake in a revocation proceeding and the government's interest in protecting the public. Second, the majority decision in *Nguyen* II conflicts with this Court's due process decisions by inflating a physician's interest in his or her license into a liberty interest equivalent to the loss of liberty involved in a civil commitment or the termination of parental rights. Third, the majority decision fails to recognize the state's vital interest in protecting its citizens from incompetent physicians—an interest this Court has long recognized. Finally, this case presents an important national question because all states regulate physicians and discipline them for unprofessional conduct. Most states have selected the preponderance of the evidence standard but some states choose clear and convincing evidence. The essence of federalism is that states must be free to develop a variety of

solutions to problems and not be forced into a common mold. A single constitutional standard removes that choice for all states, and this Court should decide whether the Due Process Clause prohibits the states from making their different public policy decisions about the proper burden of proof in a medical disciplinary proceeding.

### 1. There Is A Conflict Among The States Over The Burden Of Proof Required By The Due Process Clause In A Medical Disciplinary Proceeding

The Court should grant the petition to resolve a conflict among the states, which involves a substantial constitutional question. Courts in New Jersey, South Carolina, Iowa, Vermont, Wisconsin, Oregon, and New York, and the District of Columbia hold that the Due Process Clause is satisfied by the preponderance of the evidence standard, which is the traditional standard in civil administrative cases. These decisions include:

- *In re the Revocation of the License of Polk, M.D.*, 449 A.2d 7, 16-17 (N.J. 1982) ("we conclude that the application of the burden of proof by a fair preponderance of the evidence standard in this case did not result in a deprivation of any rights guaranteed to Polk under . . . the Due Process clause of the Fourteenth Amendment").

- *Anonymous v. State Bd. of Med. Examiners*, 496 S.E.2d 17, 20 (S.C. 1998) ("We find a preponderance of the evidence standard adequately protects a physician's property interest in his license.").

- *Eaves v. Bd. of Med. Examiners*, 467 N.W.2d 234, 237 (Iowa 1991) ("'A preponderance of the evidence is all that is required.' This standard is sufficient to satisfy due process.") (citations omitted).

- *In re Smith*, 730 A.2d 605, 612 (Vt. 1999) ("We conclude that these statutory procedures, together with the preponderance of evidence burden of proof placed on the State, afforded the constitutional process due to appellee.").

- *Gandhi v. State Med. Examining Bd.*, 483 N.W.2d 295, 298 (Wis. Ct. App. 1992) (the court rejected Gandhi's argument that "due process mandates proof of the allegations against a physician by at least clear and convincing evidence").

- *Gallant v. Bd. of Med. Examiners*, 974 P.2d 814, 819 (Or. Ct. App. 1999) ("Balancing the three factors, we conclude that the Due Process Clause requires no more than the preponderance of the evidence standard of proof in this case.").

- *Giffone v. De Buono*, 263 A.D.2d 713, 693 N.Y.S.2d 691, 694 (1999) ("We note that petitioner does argue that the burden of proof in license revocation proceedings should be 'clear and convincing' evidence of guilt before the Committee, as opposed to 'preponderance of the evidence'. This court has previously rejected this contention, and do [sic] so again here.") (citations omitted).

- *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 601 (D.C. 1979) ("In short, we hold that the preponderance of the evidence test adequately protected Dr. Sherman's Fifth Amendment property interest in his license.").

On the other hand, in *Nguyen* II, Washington joins Oklahoma and Wyoming in reaching the contrary conclusion that the Due Process Clause requires clear and convincing evidence.

- *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1347 (Okla. 1996) ("As stated, constitutional due process requires the standard of proof in disciplinary proceedings against a person holding a professional license to be clear and convincing. The Board's rule does not comply with federal or state minimum constitutional due process requirements and is invalid.").[4]

- *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000) ("Due process requires that the Board prove its disciplinary cases by clear and convincing evidence.").[5]

The conflict among the states involves an important Due Process question—what is the required burden of proof to revoke a professional license? "[D]ue process is flexible and call[s] for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The proper burden of proof to be applied is traditionally a legislative policy decision and this Court has recognized "Congress' traditional powers to prescribe standards of proof". *Steadman v. Sec. & Exchange Comm'n*, 450 U.S. 91, 96 n.10 (1981) (internal punctuation omitted). States have similar legislative authority, and the burden of proof required may vary from state to state. "The essence

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[4] In *Johnson*, the court ruled that clear and convincing evidence was required by both the United States Constitution and the Oklahoma Constitution. *Johnson*, 913 P.2d at 1347.

[5] The decision in *Painter* was based on the Wyoming Constitution. However, the court's analysis was based on the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Painter*, 998 P.2d at 941. Nothing in the Court's analysis suggests that the Wyoming due process clause is stricter than the Due Process Clause in the Fourteenth Amendment. So it appears that the result would have been the same under the United States Constitution.

of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431. So, state procedures, such as burden of proof, may "vary so long as they meet the constitutional minimum". *Id.*

In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), this Court set out three factors to be considered in determining the appropriate process. Applying those factors to the issue of burden of proof, this Court held that the Due Process Clause requires clear and convincing evidence in two situations. The first is involuntary civil commitment. *Addington*, 441 U.S. at 428-31. The second is termination of parental rights. *Santosky v. Kramer*, 455 U.S. 745, 758-69 (1982). The question presented here is whether professional license revocation is a third situation requiring clear and convincing evidence.

The conflict between the states is based on a fundamental question of constitutional law about the interests at stake in a proceeding to discipline a physician. The split is well reflected in the majority and dissenting opinions in *Nguyen* II. The majority and dissent disagreed about the importance of Dr. Nguyen's private interest in his license and about the nature of the state's interest in protecting its citizens from incompetent physicians. The majority and dissent also disagreed about the risk of error in the proceeding. The difference between the majority and dissent in *Nguyen* II reflects the wider dispute among all the states.

The first factor is "the private interest that will be affected by the official action". *Mathews*, 424 U.S. at 335. In *Nguyen* II, the court described the property interest in the professional license as "profound", stating that the "loss of a professional license is more than a monetary loss; it is a loss of a person's livelihood and loss of a reputation". *Nguyen* II, 29 P.3d at 694, App. at 11, 12. The court concluded that the

loss of professional reputation was equivalent to the personal loss of liberty suffered in involuntary civil commitment or termination of parental rights. *Nguyen* II, 29 P.3d at 694, App. at 12.

A majority of the courts take a different view. While recognizing that there is a substantial property interest in a professional license, these courts hold that that interest does not involve a fundamental right. "License revocation affects a property interest that is in no sense as serious as the liberty interests implicated in confinement or deportation." *Sherman*, 407 A.2d at 601. "The private interest of parents to care for their children is a substantial, constitutional right. . . . The private interest of a physician to practice his or her profession, on the other hand, is not a right; it is a privilege." *Gandhi*, 483 N.W.2d at 299-300.

The second *Mathews* factor is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards". *Mathews*, 424 U.S. at 335. Washington law has numerous procedural safeguards, but *Nguyen* II held that these safeguards did not offset the "failure to impose the requisite minimum burden of proof which is specifically designed to impress the factfinder with the importance of the decision and thereby reduce the chance of error". *Nguyen* II, 29 P.3d at 695, App. at 15 (internal quotation marks omitted). The court also pointed to the fact that the Commission investigated, monitored, and ultimately sat in judgment of Dr. Nguyen. *Nguyen* II, 29 P.3d at 695-96, App. at 16.

A majority of courts hold that procedural safeguards in the law ensure that there is little risk of erroneous deprivation. "The framework for the conduct of contested agency cases is designed to provide complete fairness, objectivity and impartiality in the administrative

adjudication." *In re Polk*, 449 A.2d at 16. "There are ample safeguards in Wisconsin to ensure due process in administrative hearings. These safeguards afford a realistic opportunity to prepare and meet the challenges posed in the proceeding." *Gandhi*, 483 N.W.2d at 300. These courts also pointed out that the disciplinary boards had particular expertise to understand the issues because they "relate to a profession, a specialty in which the parties, the witnesses and the members of the tribunals are all uniquely qualified and share a common expertise." *In re Polk*, 449 A.2d at 16. "[B]ecause the ultimate fact finders are mostly physicians, and by experience and training, therefore, are uniquely qualified to render a decision concerning this particular profession, the evidence and standards are likely to be well understood by the parties and the fact finders. As such, there is less chance of error." *Gandhi*, 483 N.W.2d at 300 (citation omitted).

The final *Mathews* factor is "the Government's interest". *Mathews*, 424 U.S. at 335. In *Nguyen* II, the court took a narrow view of the government's interest which it limited to "the efficient and economic administration of its affairs". *Nguyen* II, 29 P.3d at 696, App. at 17. The court held that the government's interest was satisfied because increasing the burden of proof to clear and convincing evidence would not "impose unacceptable fiscal and administrative burdens upon the government". *Nguyen* II, 29 P.3d at 696, App. at 18.

The position of a majority of states is that the government has a substantial interest in protecting the lives and health of its citizens. The "State has a substantial interest in the regulation and supervision of those who are licensed to practice medicine. In this capacity, the State acts as the guardian of the health and well-being of its citizens. It must be vigilant and competent to protect these interests fully." *In re Polk*, 449 A.2d at 15. "[T]he state has not only a strong

interest, but also an *obligation* to protect the health, safety and welfare of its citizens. We further agree with the trial court that the practice of medicine presents a prime example of a profession in which incompetency, wrongdoing or misconduct can threaten life itself." *Gandhi*, 483 N.W.2d at 299.

**2. The Washington Supreme Court's Decision Conflicts With This Court's Due Process Analysis Of The Private Interest Involved**

*Nguyen* II conflicts with this Court's due process analysis of the private interest involved. *Nguyen* II inflated the loss of Dr. Nguyen's license to practice medicine into "a 'significant deprivation of liberty' or 'stigma'", equivalent to civil commitment or termination of parental rights. *Nguyen* II, 29 P.3d at 694, App. at 12-13. The holding conflicts with this Court's analysis of the private interest and leads to the fundamentally flawed conclusion that medical disciplinary proceedings require clear and convincing evidence.

The majority opinion below points to two considerations to reach its conclusion that Dr. Nguyen has a liberty interest in his license to practice medicine sufficiently fundamental to require a more demanding burden of proof than that applied in the vast majority of civil cases—the economic value of the license and the stigma of losing it. According to *Nguyen* II:

> "Loss or suspension of the physician's license destroys his or her ability to practice medicine, diminishes the doctor's standing in both the medical and lay communities, and deprives the doctor of the benefit of a degree for which he or she has spent

countless hours and probably tens (if not hundreds) of thousands of dollars pursuing." *Nguyen* II, 29 P.2d at 694, App. at 12.

This Court has not viewed economic loss and the resulting stigma as giving rise to significant deprivation of liberty. And the Court has required clear and convincing evidence under the Due Process Clause only where there was a fundamental liberty interest at stake. *Addington* involved involuntary civil commitment—an actual deprivation of physical liberty. *Santosky* involved the termination of parental rights. The Court has recognized that the "interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court". *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

In contrast, the Court has rejected Due Process challenges to the legislative choice of preponderance of the evidence when there was no fundamental liberty interest at stake. In *Rivera v. Minnich*, 483 U.S. 574 (1987), the Court considered a state statute that required a preponderance of the evidence to establish paternity. The Court held that the state law did not violate the Due Process Clause. The Court distinguished the private interests involved in establishing paternity and terminating parental rights. According to the Court, the private interest at stake in paternity was economic—"avoiding the serious economic consequences that flow from a court order that establishes paternity and its correlative obligation to provide support for the child". *Rivera*, 483 U.S. at 580. Justice Brennan, in dissent, pointed out the "social stigma resulting from an adjudication of paternity". *Id.* at 585 (citing *County of Hennepin v. Brinkman*, 378 N.W.2d 790, 794 (Minn. 1985)). But this did not cause the majority to inflate the private interest in avoiding paternity to a fundamental liberty interest. In contrast to the economic interest in paternity, the Court

described parental rights as "an interest far more precious than any property right". *Id.* at 580.

*Vance v. Terrazas*, 444 U.S. 252 (1980), is another case where the Court held that the Due Process Clause did not require a clear and convincing burden of proof because it did not involve a fundamental liberty interest. *Vance* involved laws governing the loss of United States citizenship. Prior to 1961, Congress set out the procedure for expatriation but did not specify a standard of proof. In the absence of Congressional action, this Court applied the standard of clear and convincing evidence. *Nishikawa v. Dulles*, 356 U.S. 129, 133 (1958). After *Nishikawa*, Congress amended the law to require a preponderance of the evidence. *Vance*, 444 U.S. at 264-65. In *Vance*, this Court upheld the preponderance standard against a Due Process challenge. The Court recognized the importance of citizenship. Indeed, in *Schneiderman v. United States*, 320 U.S. 118, 122 (1943), an earlier case involving denaturalization, the Court described United States citizenship as "the highest hope of civilized man". Despite this fact, *Vance* went on to explain that "expatriation proceedings are civil in nature and do not threaten a loss of liberty". *Vance*, 444 U.S. at 266. Clearly, a person's interest in United States citizenship is greater than a person's interest in a professional license.

Thus, in its Due Process analysis, the Court has been careful to distinguish fundamental liberty interests from other important interests. This allows legislative bodies the flexibility to strike the proper balance between public and private interests in selecting the appropriate burden of proof when fundamental liberty interests are not at stake. The majority opinion below departs from these principles. It attempts to bootstrap an essentially economic interest into a liberty interest requiring special protection. This forecloses the legislative freedom to determine that a different standard of proof more appropriately balances the private economic

and public welfare interests that are implicated in a medical disciplinary proceeding. This conflicts with this Court's basic Due Process jurisprudence.

### 3. The Washington Supreme Court's Decision Fails To Recognize The State's Substantial Interest In Protecting The Lives And Health Of Its Citizens

Regulation of the practice of medicine is a traditional state function with its inception in colonial times. The first colonial act requiring a licensing examination was passed in 1760 by New York and applied only in New York City. It provided for a board of medical examiners who examined candidates for medical practice and provided penalties for practicing without a license. Robert C. Derbyshire, *Medical Licensure And Discipline In The United States* 3-4 (1969). This was followed in 1762 by a similar New Jersey statute applying to the entire colony. *Id.* Today every state in the United States regulates the practice of medicine. Edward H. Forgotson et. al., *Licensure of Physicians*, 1967 Wash. U. L.Q. 249 (1967).

Washington has regulated the practice of medicine since statehood. The Washington Constitution, which was adopted in 1889, explicitly recognized the importance of regulating the medical profession. Article XX, section 2 of the Washington Constitution provides: "The legislature shall enact laws to regulate the practice of medicine and surgery, and the sale of drugs and medicines." App. at 163. In its first session in 1890, the Legislature adopted a law regulating the practice of medicine. 1889-90 Wash. Laws, p. 114. The law established a medical examining board to examine and license physicians. The law also provided for revocation of a license for unprofessional conduct after notice and a hearing. The Washington Supreme Court has recognized that the state regulates the practice of medicine, including the discipline of doctors, because "of the paramount importance of the health

and well-being of Washington citizens [and] the role of medical professionals in preserving this health and well-being". *Haley v. Med. Disciplinary Bd.*, 818 P.2d 1062, 1066 (Wash. 1991).

In 1889, this Court recognized the important state interests involved in regulating the medical profession in *Dent v. West Virginia*, 129 U.S. 114 (1889). *Dent* involved a challenge to a West Virginia law licensing doctors. The plaintiff was turned down for a license because the licensing board concluded that the "diploma he presented was insufficient". *Dent*, 129 U.S. at 125. The plaintiff argued that the denial of a license violated the Due Process Clause because it denied him the right to practice his profession. The Court rejected this argument recognizing that the "power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity". *Id.* at 122. The Court emphasized that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that [the physician] possesses the requisite qualifications". *Id.* at 122-23. The purpose was to protect society by excluding "from practice those who have not such a license, or who are found upon examination not to be fully qualified". *Id.* at 123. The Court concluded by stating: "No one has a right to practice medicine without having the necessary qualifications of learning and skill[.]" *Id.* at 123.

*Nguyen* II ignores the states' substantial interest in regulating the medical profession, which was recognized by the Court in *Dent*. Instead, the majority focuses upon the state's interest in "the efficient and economic administration of its affairs". *Nguyen* II, 29 P.3d at 696, App. at 17. Efficient and economic administration is clearly not the state's primary interest in regulating the medical profession.

## 4. The Petition Raises An Important National Question

The question of whether the Due Process Clause requires more than a preponderance of the evidence to revoke a professional license is an important national question. It affects all fifty states and the District of Columbia.[6] Each of these jurisdictions licenses the practice of medicine. Forgotson, 1967 Wash. U. L.Q. 249. And each should retain the flexibility to apply standards of proof that it determines appropriate in balancing the public and private interests implicated in medical licensing. Thirty states and the District of Columbia have chosen to employ the preponderance of evidence standard, either by statute, by administrative rule, or by common law.[7] In addition, Washington, Oklahoma, and

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[6] Moreover, at the federal level, the preponderance standard has been routinely applied to economic interests—even when there was associated stigma from the loss of a professional license or allegations of fraud. *See Steadman*, 450 U.S. at 94 (Congress applied the preponderance of evidence standard to antifraud provisions of federal securities law "permanently barring petitioner from associating with any investment adviser or affiliating with any registered investment company"); *Grogan v. Garner*, 498 U.S. 279, 280-81 (1991) (the Court applied the preponderance of evidence standard to prevent discharge in bankruptcy of "certain kinds of obligations, including those for money obtained by 'actual fraud'"); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-88 (1983) (the Court applied the preponderance of evidence standard to a private action "to establish fraud under Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a)").

[7] Nine of these states have specifically established the preponderance standard in medical disciplinary hearings by statute or administrative rule. *See* Haw. Rev. Stat. § 91-10(5) (2001); Ky. Rev. Stat. Ann. § 13B.090(7) (2001); Mass. Gen. Laws ch. 112, § 5 (2001) (board may impose discipline "upon proof satisfactory to a majority of the board"); Mont. Code Ann. § 37-1-311 (2001); Nev. Rev. Stat. 630.352(1) (2001); N.Y. Pub. Health Law § 230(10)(f) (McKinney 2001); Tenn. Comp. R. & Regs. 1360-4-1.02(7) (2001); Vt. Stat. Ann. tit. 3 § 129(a), (b) (2000) (upheld on constitutional challenge by *In re Smith*, 730 A.2d 605, 613 (Vt. 1999)); Wis. Stat. Ann. § 440.20(3) (West 2001) (upheld on

constitutional challenge by *Gandhi v. State Med. Examining Bd.*, 483 N.W.2d 295, 298 (Wis. Ct. App. 1992)).

The remaining twenty-one states and the District of Columbia require a preponderance of evidence by judicial decision. *See Ferguson v. Hamrick*, 388 So. 2d 981, 983 (Ala. 1980) (using preponderance standard established in Ala. Code § 34-24-90 (1975), which was since repealed in 1981); *Ethridge v. Arizona Bd. of Nursing*, 796 P.2d 899, 904 (Ariz. 1989); *Johnson v. Arkansas Bd. of Examiners in Psychology*, 808 S.W.2d 766, 769 (Ark. 1991); *Swiller v. Comm'r of Pub. Health & Addiction Servs.*, No. HHD CV 95-0705601, 1995 WL 611754 (Conn. Super. Ct. Oct. 5, 1995) (chiropractor); *Sherman v. Comm'n on Licensure to Practice the Healing Art*, 407 A.2d 595, 600 (D.C. 1979) (upheld preponderance standard on constitutional challenge); *Georgia Bd. of Dentistry v. Pence*, 478 S.E.2d 437, 444 (Ga. Ct. App. 1996) (upheld preponderance standard against claim that "reasonable doubt" should be used); *Eaves v. Bd. of Med. Examiners*, 467 N.W.2d 234, 237 (Iowa 1991) (upheld preponderance standard on constitutional challenge); *Thangavelu v. Dep't of Lic. & Reg.*, 386 N.W.2d 584, 589 (Mich. Ct. App. 1986); *In re Med. License of Friedenson*, 574 N.W.2d 463, 466 (Minn. Ct. App. 1998); *Bever v. Bd. of Reg. for the Healing Arts*, No. WD 57880, 2001 WL 68307, at *4 (Mo. Ct. App. Jan. 30, 2001), *cause ordered transferred to Mo. S. Ct.* (Mar. 27, 2001), *reh'g denied* (Mar. 27, 2001); *Petition of Grimm, Ph.D.*, 635 A.2d 456, 463 (N.H. 1993) (upheld preponderance standard on constitutional challenge); *In re the Revocation of the License of Polk*, 449 A.2d 7, 17 (N.J. 1982) (upheld preponderance standard on constitutional challenge); *Foster v. Bd. of Dentistry*, 714 P.2d 580, 582 (N.M. 1986) (but clear and convincing used where fraud alleged); *In re Kincheloe*, 157 S.E.2d 833, 841 (N.C. 1967); *Kraft v. North Dakota Bd. of Nursing*, 631 N.W.2d 572, 576 (N.D. 2001); *Gallant v. Bd. of Med. Examiners*, 974 P.2d 814, 819 (Or. Ct. App. 1999) (upheld preponderance standard on constitutional challenge), *but see Bernard v. Oregon Bd. of Dental Examiners*, 465 P.2d 917 (Or. Ct. App. 1970) (due process requires clear and convincing standard when fraud or quasi-criminal activity alleged); *Shearer v. State Med. Bd.*, 97 N.E.2d 688, 691 (Ohio Ct. App. 1950), *but see* Ohio Rev. Code Ann. § 3719.121(A), (B) (West 2001) (clear and convincing standard for disciplinary action based on illegal drug use); *Starr v. State Bd. of Med.*, 720 A.2d 183, 191 (Pa. Cmwlth. Ct. 1998); *Anonymous v. State Bd. of Med. Examiners*, 496 S.E.2d 17, 20 (S.C. 1998) (upheld preponderance standard on constitutional challenge); *Texas Bd. of Med. Examiners v. Haynes*, 388 S.W.2d 258, 261 (Tex. Ct. App. 1965). Two states use a preponderance of the evidence standard, but qualify it with the higher burden of proof: In an attorney general opinion, Kansas deemed its

Wyoming authorized the preponderance standard by statute or administrative rule but the choice was invalidated by the judiciary on due process grounds.[8] Eleven states have chosen to strike a different balance and currently apply the clear and convincing standard.[9]

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standard of proof to be "a preponderance of evidence that is clear and convincing in nature". *See* Kan. Atty. Gen. Op. No. 95-54 (1995). Vermont requires a "clear preponderance" of evidence. *See Vance v. Fordham*, 671 P.2d 124, 128 (Utah 1983).

[8] *Johnson v. Bd. of Governors of Registered Dentists*, 913 P.2d 1339, 1347 (Okla. 1996) (struck down administrative rule adopting preponderance standard on state and federal constitutional due process grounds); *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000) (declaring Wyo. Stat. Ann. § 33-26-407(b) (1999), requiring preponderance of evidence, unconstitutional on state equal protection grounds).

[9] Two of these states require "clear and convincing evidence" in medical disciplinary hearings by statute. *See* Fla. Stat. Ann. § 458.331(3), *amended by* 2001 Fla. Sess. Law Serv. ch. 2001-277, §§ 21, 76 (West); Md. Code Ann., Health Occ. § 14-405(b) (2000), *amended by* 2001 Md. Laws ch. 478 (H.B. 423) *and* 2001 Md. Laws ch. 479 (H.B. 424). *But see Rife v. Dep't of Prof'l Reg.*, 638 So. 2d 542, 543 (Fla. Dist. Ct. App. 1994) (court stated that higher standard not required to satisfy Due Process under United States Constitution).

The remaining nine states that use "clear and convincing evidence" or its equivalent do so under the common law. *See Storrs v. State Med. Bd.*, 664 P.2d 547, 555 (Alaska 1983), *but see In re Robson*, 575 P.2d 771 (Alaska 1978) (standard of proof for attorney discipline is preponderance of evidence); *Silva v. Superior Ct.*, 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577, 582 (1993) (struck down preponderance of evidence standard of proof based on statutory analysis); *Cooper v. Bd. of Prof'l Discipline*, 4 P.3d 561, 568 (Idaho 2000); *Schireson v. Walsh*, 187 N.E. 921, 923 (Ill. 1933) ("clearly and conclusively"); *Allen v. Louisiana Bd. of Dentistry*, 531 So. 2d 787, 798 (La. Ct. App. 1988), *rev'd on other grounds*, 543 So. 2d 908 (La. 1989); *McFadden v. Mississippi Bd. of Licensure*, 735 So. 2d 145, 152 (Miss. 1999); *Davis v. Wright*, 503 N.W.2d 814, 818 (Neb. 1993) (struck down preponderance of evidence standard on equal protection grounds); *In re Zar*, 434 N.W.2d 598, 602 (S.D. 1989) (making exception to preponderance standard in administrative hearings for license revocations because of important interest involved); *Clark v. West Virginia Bd. of Med.*, 508 S.E.2d 111,

If the majority opinion below is correct, none of the states have a choice in the matter and more than twenty-five jurisdictions are applying a constitutionally impermissible burden of proof. This seems unlikely since this Court has often looked to the burden chosen by a majority of states to guide its decision on the issue. *Addington*, 441 U.S. at 431-32; *Rivera*, 483 U.S. at 577-78. Indeed, the number of the states applying the preponderance standard gives that standard a "powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment". *Rivera*, 483 U.S. at 578.

The fact that some states employ clear and convincing evidence does not undercut the preponderance standard. As the Court observed in *Addington*: "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington*, 441 U.S. at 431. States have the freedom to experiment and make different choices about procedure—including the appropriate burden of proof—"so long as they meet the constitutional minimum". *Id.* at 431.

Since the constitution limits the states' freedom to act, the courts should be cautions about establishing constitutional standards. The Court spoke to this point in *Washington v. Glucksberg*, 521 U.S. 702 (1997), considering whether there was a liberty interest in physician-assisted suicide. "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *Glucksberg*, 521 U.S. at 720. The Court cautioned that it must exercise care "lest the liberty protected by the Due Process Clause be subtly transformed into the policy

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121 (W. Va. 1998) (where licensee charged with fraudulently obtaining license).

*preferences of the Members of this Court*". *Id.* Here, *Nguyen* II has placed the issue of burden of proof outside the arena of public debate. This is a fundamental constitutional question that requires this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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